No. 17-9558

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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BIG HORN COAL COMPANY
Petitioner

v.

SYLVIA SADLER, widow of and on behalf of Edgar Ross Sadler, and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

_____

On Petition for Review of an Order of the Benefits
Review Board, United States Department of Labor

_____

BRIEF FOR THE FEDERAL RESPONDENT
(Oral Argument Requested)

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

IN THE UNITED STATES COURT OF APPEALS
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No. 17-9558

BIG HORN COAL COMPANY
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v.

SYLVIA SADLER, widow of and on behalf of Edgar Ross Sadler, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This appeal involves two claim for benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944. Edgar Ross Sadler (the miner) filed a claim for benefits June 1, 2010. CCR DX 2.[1] Sylvia Sadler, the miner's

[1] For the Court's convenience, the brief will cite to both the Certified Case Record (CCR) and Joint Appendix (A), where available. The following abbreviations will be used in referencing the CCR: Director's Exhibit (DX); Claimant's Exhibit (CX); and Employer's Exhibit (EX).

widow, continued to pursue her husband's claim after his death in 2014, and filed a separate claim seeking survivor's benefits on October 22, 2014. CCR DX 24.

On April 25, 2016, Administrative Law Judge William S. Colwell (the ALJ) issued an Order Denying Employer's Motion for Reconsideration, to Disqualify, and to Vacate, and Order Awarding Benefits on the living miner's claim. CCR 137-153; A 267-81. Big Horn Coal Company (Big Horn or employer) timely appealed this decision to the Benefits Review Board (the Board) on May 23, 2016, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). CCR 129-131; A 283-85.

The ALJ issued an Order Awarding Survivor's Benefits on July 21, 2016. CCR 132-136. Big Horn timely appealed this decision with the Board pursuant to section 921(a) on August 20, 2016. CCR 116-118. On November 10, 2016, the Board issued an order granting Big Horn's motion to consolidate the appeals. CCR 101-103. The Board had jurisdiction to review the ALJ's decisions pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On October 19, 2017, the Board affirmed both awards. CCR 1-13; A 286-96. Big Horn timely petitioned this Court for review of the Board's decision on September 20, 2017. A 297-99. The Court has jurisdiction over the petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of

appeals in which the injury occurred. The injury – the miner's occupational exposure to coal-mine dust – took place in Wyoming, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUES

1. In *Lucia v. Securities & Exchange Commission*, 138 S.Ct. 2044 (2018), the Supreme Court held that administrative law judges (ALJs) employed by the Securities and Exchange Commission are inferior officers and, thus, must be appointed in conformity with the strictures of the Appointments Clause. *Lucia* also observed that "one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief." 138 U.S. at 2055 (emphasis added).

This case was pending before the Department of Labor for over seven years, and during that time Big Horn never once challenged the ALJ's authority under the Appointments Clause. Rather, Big Horn raised the issue for the first time on appeal to this Court.

Is Big Horn's Appointments Clause challenge timely as *Lucia* requires?

2. The BLBA provides benefits for miners who suffer from a totally disabling pulmonary impairment due to pneumoconiosis resulting from coal mine employment. Section 932(f) of the Act provides that to be eligible for benefits, a

miner must file a claim within three years of receiving a medical determination of total disability due to pneumoconiosis.

The Department of Labor's (DOL) regulation implementing section 932(f) provides for waiver or tolling of the limitations period in cases involving extraordinary circumstances. 20 C.F.R. § 725.308(c). Supreme Court precedent holds that federal statutory limitations periods are subject to equitable tolling unless otherwise provided by statute. The BLBA does not preclude equitable tolling.

Is DOL's regulation providing for equitable tolling valid? [2]

STATEMENT OF FACTS

A. Constitutional background

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Heads of Departments," or the "Courts of Law." U.S. Const. Art. II, sec. 2, cl. 2.

B. Statutory and regulatory background

1. The BLBA's entitlement provisions

The BLBA provides for the award of disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as "black lung disease." 30 U.S.C. § 901(a); 20 C.F.R. §

[2] This brief does not address the remaining issues raised in Big Horn's opening brief.

718.1. Section 932(*l*) of the BLBA, 30 U.S.C. § 932(*l*), provides for automatic derivative benefits to a surviving spouse of a miner when the miner has been awarded benefits on a claim filed during his lifetime. *U.S. Steel Mining Co., v. Director, OWCP*, 719 F.3d 1275, 1282-1283 (11th Cir. 2013); *Vision Processing, LLC v. Groves*, 705 F.3d 551, 553 (6th Cir. 2013). Here, the employer has conceded that the miner was totally disabled due to pneumoconiosis.

2. The BLBA's statute of limitations and implementing regulation

The BLBA provides in relevant part that "[a]ny claim for benefits by a miner under this section shall be filed within three years . . . [of] a medical determination of total disability due to pneumoconiosis." 30 U.S.C. § 932(f). The regulation implementing this statutory provision is 20 C.F.R. § 725.308, which was originally promulgated in 1978 after a notice and comment rulemaking. 43 Fed. Reg. 36785 (August 18, 1978). In addition to setting forth the three-year statute of limitations consistent with the statute, the regulation provides that "the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances." 20 C.F.R. § 725.308(c).[3]

[3] Effective August 31, 2018, paragraph 725.308(c) will be redesignated as 725.308(b). Certain introductory and unrelated language will also be deleted. 83 Fed. Reg. 27690, 27695 (June 14, 2018).

C. Procedural history

1. The miner's initial claim for benefits

The miner filed an initial claim for benefits under the BLBA in 1990, which was ultimately denied by the Board on July 28, 2000.[4] CCR 3, n.2; A 288. Pursuant to 20 C.F.R. § 725.310, he timely requested modification of the denial on July 18, 2001. CCR 2; A 36. The district director denied the modification request on October 2, 2001. CCR 2-3; A 37-41. The case was then referred for a formal hearing to the Office of Administrative Law Judges (OALJ) and subsequently assigned to the ALJ. CCR 2-3.

While the claim was pending before the ALJ, the miner underwent a pulmonary examination by Dr. Cecile Rose. CCR EX 2; A 116-125. On September 16, 2005, Dr. Rose issued a report diagnosing the miner with a total pulmonary disability due to pneumoconiosis. *Id.* It is undisputed that this diagnosis was communicated to the miner, and that Dr. Rose's medical report was sufficient to start the running of the three-year statute of limitations for filing a claim under the BLBA.

[4] The district director initially denied the claim on June 5, 1990. The miner then requested a formal hearing before an ALJ; no further action was taken however. The miner then filed a second claim for benefits in 1994, at which time it was discovered that the miner's first claim was still pending. The two claims were merged, 20 C.F.R. § 725.309(a), and finally denied by the Board in 2000. CCR 3, n.2.

On June 6, 2008, the miner filed a motion to withdraw his modification request, indicating that he intended to obtain new medical evidence and file a new claim with the district director. A 64-65. The ALJ held a formal hearing on June 12, 2008, at which time he addressed the miner's withdrawal motion. A 46-62. The ALJ explained to the miner that by withdrawing his modification request, the prior denial of his claim would stand. A 54. The ALJ further explained that the miner could file a new claim that would be governed by the 2001 regulations, which among other things, limit the amount of evidence the parties can submit. A 55. The miner indicated that he had spoken to his attorney about the matter and wanted to withdraw his modification request. A 56-57. The ALJ issued a formal order granting the miner's motion to withdraw his modification request on October 29, 2008. A 66-70.

2. The miner's current claim for benefits

The miner filed a subsequent claim on June 1, 2010. CCR DX 2. The district director issued a proposed decision and order awarding benefits in January 2011. CCR DX 15. Big Horn then requested a formal hearing. CCR DX 16.

On February 16, 2011, the case was transferred to OALJ and eventually assigned again to the same ALJ. CCR DX 20. The miner passed away on February 26, 2014, while the case was pending. CCR DX 26. Mrs. Sadler

continued to pursue her husband's claim but also filed a claim for survivor's benefits. CCR DX 24.

3. The ALJ denies Big Horn's motion to dismiss.

On June 2, 2014, Big Horn moved to dismiss the case, arguing that the miner's claim was filed after the three-year statute of limitations had run. A 230-239. The employer argued that Dr. Rose's 2005 diagnosis of total disability due to pneumoconiosis was communicated to the miner and therefore triggered the running of the limitations period for filing the claim. A 233-236. Because the miner's 2010 claim was filed two years after the limitations period had run, the employer contended that the claim was untimely. A 237

On July 21, 2015, the ALJ issued an order denying Big Horn's motion to dismiss. A 240-249. The ALJ acknowledged that Dr. Rose's report had commenced the running of the statute of limitations on the claim; however, he observed that 20 C.F.R. § 725.308(c) permitted the limitations period to be tolled upon a showing of extraordinary circumstances. A 244-245. The ALJ concluded that tolling was appropriate under the circumstances presented here because he had "made clear on multiple occasions during" the June 2008 hearing (regarding withdrawal of the miner's prior claim) that the miner would be able to file a subsequent claim under the 2001 regulations, and that the miner reasonably relied

on those representations. A 246-247. Having found that tolling applied, the ALJ concluded that the claim was timely.

4. The ALJ denies Big Horn's motions for reconsideration and disqualification, and awards benefits.

On August 20, 2015, Big Horn requested reconsideration of the denial of its motion to dismiss, arguing that the ALJ erred as a matter of law in finding that the statute of limitations had been tolled. A 250-256. The employer then filed a motion to disqualify the ALJ due to his handling of the prior claim and to vacate his prior order. (Big Horn requested that the ALJ be disqualified because his equitable tolling determination was based on information the ALJ provided to the claimant when the first claim was withdrawn.) A 257-266.

On April 25, 2016, the ALJ issued an order denying the employer's motions and awarding benefits to the miner. CCR 137-153; A 267-282. Relevant to this appeal, the ALJ affirmed his finding that the statute of limitations was tolled, explaining that "the scenario presented by the instant case illustrates an example of extraordinary circumstances, and a finding of extraordinary circumstances here comports well with the goal of eliminating the 'inequitable denial of claims . . .' " (citing 43 Fed. Reg. 36785). CCR 145; A 275. The ALJ clarified that his finding of extraordinary circumstances was based on the representations made to the claimant by the ALJ, and not, as the employer maintained, based on the ineffective

assistance of the miner's former counsel. CCR 146-147; A 276-277. Having reaffirmed his prior finding that the claim was timely, the ALJ awarded benefits.[5]

5. The Board affirms the award of benefits.

On appeal, Big Horn continued to make its case that the miner's claim was untimely. It argued that BLBA Section 932(f) makes no mention of a waiver or tolling exception to the time limitations, and therefore the DOL lacked the authority to promulgate the waiver exception in 20 C.F.R. § 725.308(c). CCR 78-99; Supplemental A. 17-18. On October 19, 2017, the Board rejected this argument and affirmed the award of benefits. CCR 1-13; A 286-296. Citing *Young v. U.S.*, 535 U.S. 43 (2002), the Board observed that "statute of limitations provisions are subject to equitable tolling unless they are inconsistent with the text of the relevant statute." CCR 7; A. 292. The Board further found that Big Horn had not identified any language in the Act precluding equitable tolling. *Id.* Accordingly, it concluded that Big Horn had not shown that DOL had exceeded its authority in promulgating section 20 C.F.R. § 725.308(c).

SUMMARY OF THE ARGUMENT

The Supreme Court specified in *Lucia* that timely Appointment Clause challenges are entitled to relief. Big Horn's challenge – raised for the first time

[5] On July 21, 2016, the ALJ issued an order awarding survivor's benefits to Mrs. Sadler under the automatic entitlement provision of 30 U.S.C. 932(*l*). CCR 132-136.

before this Court and not once in seven years of administrative proceedings – is not timely. The Court should accordingly find the challenge forfeited and decline relief.

The Court should also reject Big Horn's challenge to the validity of 20 C.F.R. § 725.308(c), which provides for equitable tolling of the BLBA's three-year limitations period, 30 U.S.C. § 932(f). The Supreme Court has held that there is a presumption in favor of equitable tolling of federal statutes of limitations, which may be rebutted by establishing that equitable tolling is inconsistent with the statutory text. Big Horn has not shown that equitable tolling is inconsistent with the BLBA. In fact, it contends that the BLBA is silent on the matter. Consequently, Section 725.308(c)'s equitable tolling provision must stand.

ARGUMENT

A. Standard of review

The issues addressed in this brief – Big Horn's challenge to the ALJ's authority under the Appointments Clause and its attack on 20 C.F.R. § 725.308, DOL's regulation implementing the BLBA's limitations period – involve questions of law that this Court reviews *de novo*. *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1341 (10th Cir. 2014). The Department's interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*,

467 U.S. 837 (1984). The Court "give[s] 'considerable weight' to the Department of Labor's (DOL) construction of the statute it is entrusted to administer." *Andersen v. Director, OWCP*, 455 F.3d 1102, 1103 (10th Cir. 2006).

B. Big Horn Coal forfeited its Appointments Clause challenge by failing to raise the issue before the agency.

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Heads of Departments," or the "Courts of Law." U.S. Const. Art. II, sec. 2, cl. 2; *see Freytag v. Commissioner*, 501 U.S. 868 (1991); *Ryder v. United States*, 515 U.S. 177 (1995). Since 2000, litigants in administrative proceedings have raised Appointments Clause challenges to the appointments of ALJs who have overseen some administrative proceedings. *Landry v. FDIC*, 204 F.3d 1125, 1130 (D.C. Cir. 2000). The D.C. Circuit in *Landry* rejected an Appointments Clause challenge to the FDIC's ALJs, but the issue remained open in other circuits. In 2016, this Court held that the ALJs of the Securities and Exchange Commission were inferior officers who had not been appointed consistent with the Appointments Clause. *Bandimere v. SEC*, 844 F.3d 1168, 1170 (10th Cir. 2016). The Supreme Court reached the same conclusion this year in *Lucia v. Securities & Exchange Commission*, 138 S.Ct. 2044 (2018). Other litigants have raised similar Appointments Clause challenges in agency proceedings and before the federal courts. *See, e.g.*, *Bennett v. SEC*, 16-3827 (8th

Cir.) (challenge to SEC ALJ); *Blackburn v. USDA*, No. 17-4102 (6th Cir.) (challenge to Department of Agriculture ALJ).

In *Lucia*, the Supreme Court explained that Appointments Clause challenges, no less than other arguments, must be timely raised and are subject to forfeiture if not properly preserved. "[O]ne who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief." *Lucia*, 138 S.Ct. at 2055 (emphasis added) (quotation marks omitted). The Supreme Court emphasized that Lucia was entitled to relief – a remand to the agency for a new hearing before a properly appointed officer – because he "made just such a timely challenge" and "contested the validity of [the ALJ's] appointment before the Commission." *Id.*

In stark contrast to Lucia, Bandimere, and the many other litigants who have properly raised and preserved Appointments Clause challenges in their administrative proceedings, Big Horn never raised an Appointments Clause challenge before the ALJ or the Benefits Review Board. From February 2011, when Big Horn first requested an ALJ hearing, to October 2017, when the Benefits Review Board issued its final decision, Big Horn never contested the ALJ's appointment. Instead, Big Horn raises the challenge for first time in this Court.

That is too late. The Court should hold that Big Horn forfeited its Appointments Clause claim at this late hour.[6]

This conclusion is a straightforward application of the fundamental tenet of administrative law that courts "should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Gilmore v. Weatherford*, 694 F.3d 1160, 1169 (10th Cir. 2012) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). For black lung proceedings, this Court has explained that all objections must be made to the Benefits Review Board before a court will consider them.[7] *McConnell v. Director, OWCP*, 993 F.2d 1454, 1460 n.8 (10th Cir. 1993) (refusing to consider argument not raised before Board); *see also Micheli v. Director, OWCP*, 846 F.2d 632, 635 (10th Cir. 1988) (refusing to review ALJ's finding that was not appealed to Board); *accord Hix v. Director*, 824

[6] The Director concedes that DOL ALJs are inferior officers and that the ALJ below was not properly appointed when he decided the case in April 2016. Contrary to Big Horn's suggestion (OB 25 n.11), the Director does not contend that the Secretary's subsequent ratification of the ALJ's prior appointment, A. 300, retroactively validated his prior actions. If the Court excuses Big Horn's waiver of its Appointments Clause challenge, it will be entitled to a new proceedings before a different ALJ. *Lucia*, 138 S.Ct. at 2055.

[7] Big Horn did not raise its Appointments Clause challenge to either the ALJ or the Board. Although it arguably was required to apprise both tribunals, *see Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6/7 (1996) (issues not raised before ALJ are deemed waived or forfeited), the Court need not reach the issue because Big Horn failed to do even the bare minimum of raising the issue to the Board.

F.2d 526, 527 (6th Cir. 1987); *Arch Mineral Corp. v. Director*, 798 F.2d 215, 220 (7th Cir. 1986); *Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 1143-44 (3d Cir. 1980).

These principles apply with full force to arguments based on the Appointments Clause. The courts of appeals have consistently held that Appointments Clause challenges are "nonjurisdictional" and, thus, that a party may "forfeit[] its [Appointments Clause] argument by failing to raise it" at the appropriate time. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009); *see also In re DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (litigant forfeited Appointments Clause argument by failing to raise it before agency); *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 406 (6th Cir. 2013) ("Errors regarding the appointment of officers under Article II are 'nonjurisdictional'") (quoting *Freytag v. Commissioner*, 501 U.S. 868, 878--79 (1991)); *Evans v. Stephens*, 387 F.3d 1220, 1222 n.1 (11th Cir. 2004) (en banc) (constitutional challenge to the recess appointment of an Eleventh Circuit judge was not jurisdictional question).

Big Horn's failure to present any Appointments Clause objection to the Benefits Review Board is quintessential forfeiture. There is no reason that it could not have timely raised a constitutional challenge during the administrative proceedings. The first Appointments Clause challenge to an agency ALJ was

raised almost 20 years ago, *Landry*, 204 F.3d at 1130, and there was nothing that prevented Big Horn from timely raising a similar challenge to the ALJ here. Indeed, many similarly situated respondents in agency proceedings have timely raised Appointments Clause challenges. *See, e.g.*, *Lucia*, 138 S. Ct. at 2050 (petitioner raised Appointments Clause challenge before the agency); *Bandimere*, 844 F.3d at 1171 (same); *Landry*, 204 F.3d 1125, 1143 (D.C. Cir. 2000) (Randolph concurring) (describing same); *see also Ryder*, 515 U.S. at 177, 179, 180-82 (describing timely Appointments Clause challenge raised before a military court, and contrasting it to other similar challenges that had not been timely raised).[8]

The Supreme Court in *Freytag* chose to exercise its discretion to consider an Appointments Clause issue that had not been raised before the Tax Court, but emphasized that *Freytag* was a "rare case" and did not purport categorically to excuse petitioners from abiding by ordinary principles of appellate review in Appointments Clause cases. *Freytag*, 501 U.S. at 879 (noting that Appointments Clause challenges are "nonjurisdictional"); *id*. at 893-94 (Scalia, J., concurring) ("Appointments Clause claims, and other structural constitutional claims, have no

[8] *Ryder* also favorably compared petitioner's timely challenge to three instances where the defendant failed to timely object to the qualifications of the judge presiding over the case (and accordingly obtained no relief). 515 U.S. at 180-82 (distinguishing *Ball v. United States*, 140 U.S. 118 (1891); *McDowell v. United States*, 159 U.S. 596 (1895); *Ex parte Ward*, 173 U.S. 452 (1899)).

special entitlement to review."). Indeed, *Lucia's* "timely challenge" prerequisite must be seen as cabining *Freytag*'s (or a court's) discretion and highlighting the exceptionality of the Court's review there.

This case closely resembles the Supreme Court's 1952 decision in *L.A. Tucker Truck Lines*, 344 U.S. 33. There, the petitioner sought judicial review of a decision of the Interstate Commerce Commission (ICC). After never raising the issue before the agency, the petitioner argued for the first time on judicial review that the ICC hearing examiner – *i.e.*, the administrative law judge – who had conducted the initial administrative hearing had not been properly appointed under the Administrative Procedure Act (APA). *See L.A. Tucker*, 344 U.S. at 35. The district court accepted that argument and set aside the ICC's decision. *Id*. The Supreme Court recognized the merit in the petitioner's belated objection to the appointment of the ICC hearing examiner, 344 U.S. at 38, but nevertheless reversed because the petitioner had never raised the appointment issue before the ICC. Observing that "[t]he issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits," *id*. at 36, the Court held that the appointment issue was forfeited "in the absence of a timely objection" during the administrative proceeding, *id*. at 38.

The Federal Circuit has explained that a timeliness requirement for Appointments Clause challenges serves the same basic purposes underlying

administrative exhaustion: "First, it gives [the] agency an opportunity to correct its own mistakes . . . before it is haled into federal court, and [thus] discourages disregard of [the agency's] procedures." *In re DBC* , 545 F.3d at 1378 (internal quotations omitted). Second, "it promotes judicial efficiency, as [c]laims generally can be resolved much more quickly and economically in proceedings before [the] agency than in litigation in federal court." *Id.* at 1379 (quoting *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). Both of those reasons apply here. If Big Horn had raised the Appointments Clause challenge during the administrative proceedings, the Secretary of Labor could well have ratified the prior appointment of the ALJs and provided for a new hearing before a properly appointed ALJ. But because Big Horn never raised the issue, the Secretary was never given an opportunity to consider and resolve it during the normal course of administrative proceedings.[9]

Moreover, considering Appointments Clause arguments raised for the first time on appeal "would encourage what Justice Scalia has referred to as sandbagging, i.e., 'suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later – if the outcome is unfavorable – claiming

[9] DOL has in fact addressed this issue. As noted earlier, the Secretary ratified the prior appointment of the ALJ here "to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution." A 300.

that the course followed was reversible error.'" *In re DBC* , 545 F.3d at 1379 (quoting *Freytag*, 501 U.S. at 895 (Scalia, J., concurring in part and concurring in the judgment)); *see also Stern v. Marshall*, 564 U.S. 462, 481-82 (2011) (explaining that "[w]e have recognized the value of waiver and forfeiture rules in complex cases," because "the consequences of a litigant sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor—can be particularly severe" (internal quotation marks, alterations, and citations omitted)); *First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086, 1088-89 (4th Cir. 1969) ("[O]rdinarily, a litigant is not entitled to remain mute and await the outcome of an agency's decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctable at the administrative level.").[10]

[10] Aside from sandbagging's obvious prejudice (allowing the proverbial two bites at the apple), it is especially problematic in black lung proceedings. This is because a claimant is entitled to interim benefits while an initially approved claim continues to be litigated. 20 C.F.R. §§ 725.420(a), 725.502(a)(1), 725.522(a) (providing for interim benefits at various stages of litigation). Typically, the Black Lung Disability Trust Fund pays these interim benefits. *See* 20 C.F.R. §§ 725.420(a), 725.522(a). If the initial award is later overturned based on a coal company's Appointments Clause claim – raised for the first time in court – the claimant may well have spent the interim benefits and be unable to repay them. In that scenario, it is the Trust Fund, not the coal company, that is saddled with the loss. *See* 20 C.F.R. §§ 725.522(b), 725.542. (Here the Trust Fund has paid $33,188.20 in benefits and $18,554.14 in medical expenses. If Sadler's award is

Big Horn gives two reasons for disregarding its forfeiture. Neither withstands scrutiny. First, Big Horn contends it preserved the Appointments Clause issue by filing motions in 2015 and 2016 with the ALJ "challenging the jurisdiction of the Department of Labor and the ALJ to act on the Sadler claim." OB 25. Not so. The motions raise a statute of limitations defense and argue that the ALJ incorrectly found equitable tolling of the time limits. A. 250-56, 257-66; *see supra* at 9 (describing motions). In no way do these motions preserve the entirely unrelated Appointments Clause issue. As this Court has stated:

> We have previously rejected attempts to present vague or ambiguous claims for relief to the district court and then introduce a new, specific theory for relief on appeal, deeming the latter argument improperly preserved. Where a litigant changes to a new theory on appeal that falls under the same general category as an argument presented at trial or presents a theory that was discussed in a vague and ambiguous way the theory will not be considered on appeal.

Folks v. State Farm Mut. Auto. Ins. Co., 784 F.3d 730, 740 (10th Cir. 2015) (internal quotations and citations omitted). Thus, Big Horn is incorrect in alleging that claimant and the Department are not prejudiced from its untimely defense – if accepted, they will be required to undergo a new round of administrative proceedings starting with a different (properly appointed) ALJ. *Lucia,* 138 S.Ct. at 2055.

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affirmed, Big Horn will have to reimburse the Trust Fund (with interest). 20 C.F.R. § 725.602.)

Second, Big Horn tries to excuse its administrative inaction by claiming that the Board lacked the "authority to void the Department of Labor ALJ program as unconstitutional." OB 26. Big Horn does not substantiate this speculation and cites no supporting legal authority. In fact, judicial precedent and Board practice point the other way. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (concluding that Congress vested the Board with the statutory power to decide substantive questions of law); *Duck v. Fluid Crane and Constr, Co.*, 2002 WL 32069335, at *2 n.4 (Ben. Rev. Bd. 2002) (stating that the Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction"); 4 Admin L. & Prac. § 11.11 (3d ed) ("Agencies have an obligation to address constitutional challenges to their own actions in the first instance."); *cf. Elgin v. Department of Treasury*, 567 U.S. 1, 2136 (2012) (calling into question "whether the oft-stated principle that agencies cannot declare a statute unconstitutional is truly a matter of jurisdiction"). If Big Horn had timely raised the Appointments Clause issue and brought *Bandimere* to the Board's attention, the Board would have addressed the issue and could have ordered a remand to a different, properly appointed ALJ (the same remedy that the Supreme Court in

Lucia ordered). *Lucia*, 138 S. Ct. at 2055. Big Horn gives no reason to think otherwise.[11]

* * *

In sum, basic tenets of administrative law required Big Horn to raise its Appointments Clause challenge before the agency. Its proffered reasons for not doing so are meritless. The Court should therefore find that Big Horn forfeited its right to challenge the ALJ's authority under the Appointments Clause.

If the Court were to excuse Big Horn's forfeiture, it is critical to understand the scope and consequences of such a decision. There are approximately 575 cases (both BLBA and Longshore Act with its extensions) currently pending at the Benefits Review Board. Of these, the Director is aware of 61 cases where an Appointments Clause challenge has been raised. Should the Court excuse forfeiture here, it will set a precedent that every losing party at the Board can cite in seeking judicial reversal – and new proceedings before a different ALJ – on the strength of an issue not raised during years of administrative proceedings. (Here for instance, the miner filed his claim in 2010.) It is not simply this case and the Sadlers' awards at stake, but hundreds of others, including many similarly situated,

[11] *Bandimere* was decided shortly after Big Horn filed its opening Board brief and months before its reply brief was due. Had Big Horn timely raised an Appointments Clause challenge, this Court's analysis in *Bandimere* would have applied to Big Horn's claim, since the law of the circuit where the miner last worked (here Wyoming) is controlling. *Shupe v. Director, OWCP*, 12 1-200 (Ben. Rev. Bd. 1989) (en banc); A.291 n.9.

previously-awarded black lung claimants, that could be upset on judicial review based on a claim that was never raised during years of administrative proceedings. That is precisely the kind of disruption that forfeiture seeks to avoid. *L.A. Tucker*, 344 U.S. at 37 ("[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

C. The BLBA does not preclude equitable tolling of its three-year limitations period.

Big Horn also argues (OB 38-41) that DOL overstepped its authority in promulgating 20 C.F.R. § 725.308(c), which explicitly allows for equitable tolling of the BLBA's three-year limitations period, 30 U.S.C. § 932(f). *See supra* at 5 (quoting both provisions). Big Horn asserts equitable tolling is impermissible because the BLBA is silent on the issue and therefore does not expressly permit it. Big Horn has it backwards. "A nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland v. Florida*, 560 U.S. 631, 648 (2010) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). Consequently, the BLBA's silence, standing alone, does not invalidate Section 725.308(c)'s equitable tolling.

The presumption in favor of equitable tolling "begins with the understanding that Congress legislates against a background of common-law adjudicatory principles," and "equitable tolling . . . is just such a principle."

Lozano v. Montoya Alvarez, 572 U.S. 1, 134 S.Ct. 1224, 1232 (2014) (internal quotations and citations omitted); *Young v. U.S.*, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling.") (internal quotations omitted). Equitable tolling thus applies "unless tolling would be 'inconsistent with the text of the relevant statute.'" *Id*. (quoting *Irwin*).

Because Big Horn fails to recognize its burden to rebut the presumption of equitable tolling, it unwittingly makes a case for it.[12] It points to no statutory text or legislative history foreclosing equitable tolling; instead, it highlights the silence regarding equitable tolling in Section 932(f) and other BLBA provisions. OB 39-40. But explicit congressional confirmation for equitable tolling is unnecessary: equitable tolling arises naturally from the backdrop of the common law, and statutory silence alone will not rebut the presumption. *See Kwai Fun Wong*, 135

[12] Throughout the agency proceedings, and here, Big Horn seems to assume (incorrectly) that Section 932(f)'s time limitation is jurisdictional. OB 39. Neither Section 932(f) nor any other BLBA provision evinces the requisite "clear statement" to transform Section 932(f), a garden-variety statute of limitations, into the "rare statute that can deprive a court of jurisdiction." *U.S. v. Kwai Fun Wong*, 135 S.Ct. 1625, 1632 (2015); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013) (emphasizing that "we have repeatedly held that filing deadlines ordinarily are not jurisdictional; indeed, we have described them as quintessential claim-processing rules) (internal quotations omitted); *cf. e.g.*, *Shendock v. Director, OWCP*, 893 F.2d 1458 (1990) (holding BLBA time limit to appeal adverse Board decision to courts of appeals is jurisdictional). Big Horn likewise mischaracterizes its Appointment Clause challenge as jurisdictional. OB 28.

S.Ct. at 1638 (observing "*Irwin* requires an affirmative indication from Congress that it intends to preclude equitable tolling"); *see also e.g.*; *Holland*, *supra* (allowing equitable tolling where statute is silent); *Irwin*, *supra* (same).[13]

Big Horn's additional contention (OB 40) that the BLBA's remedial purpose provides no affirmative justification for equitable tolling, although misguided for the same reason as above, is also incorrect. Congress's intention "to include as many miners under the Act as possible" plainly supports Section 725.308, and equitable tolling in particular. *Arch of Ky., Inc. v. Director, OWCP*, 556 F.3d 472, 482 (6th Cir. 2009); *Eighty Four Min. Co. v. Director, OWCP*, 812 F.3d 308, 312-13 (3d Cir. 2016) (remedial nature of the BLBA mandates broad reading of Section 725.308).

Equitable tolling encompasses circumstances under which a miner, while pursuing his rights, misses the claim-filing deadline through no fault of his own. *Kwai Fun Wong*, 135 S.Ct. at 1631 (equitable tolling "means a court usually may pause the running of a limitations statute in private litigation when a party has pursued his rights diligently but some extraordinary circumstance prevents him from meeting a deadline) (internal quotations omitted). In such cases, imposing

[13] Big Horn's citation to *SAS Inst. Inc. v. Iancu, Director U.S. Patent and Trademark Office*, 138 S.Ct. 1348 (2018) is unavailing. There, the Court found that the statute's plain text "supplies a ready answer" to the procedures to be used when reviewing a patent challenge. *SAS Institute* is easily distinguishable from this case, where the BLBA does not address equitable tolling.

the statute of limitations with no regard for the underlying circumstances can lead to unduly harsh results – a lost opportunity for an otherwise deserving miner to receive compensation to which he is entitled under the Act. By allowing a black lung claim to go forward, equitable tolling promotes the Act's remedial policy of compensating miners for pulmonary disease arising from their occupation. *See, e.g.*, *Consolidation Coal Co. v. Director, OWCP*, 864 F.3d 1142, 1151 (10th Cir. 2017) (upholding black lung regulation that comports with "the broad remedial purposes of the BLBA"); *Bridger Coal Co. v. Director, OWCP*, 669 F.3d 1183, 1190 (10th Cir. 2012) (observing "review of alleged errors of law, and the effect they may have had on the benefits decision, must be made in light of the premise that the Act is intended to be remedial in nature, and doubts should be resolved in favor of the disabled miner or his or her survivors"). Finally, allowing equitable tolling is consistent with the presumption of timeliness that is provided in Section 20(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 920(b), as incorporated into the Act by 30 U.S.C. § 932(a).[14]

[14] We recognize that a regulation, like the equitable tolling provision here, is typically reviewed under *Chevron's* two-step analysis. That analysis duplicates the one above and comes to the same result regardless: the BLBA is silent on equitable tolling and its promulgation in a notice and comment regulation is consistent with the statute's remedial purpose (as well as the common law's) of relieving a claimant of untoward consequences arising from a strict application of the statute of limitations.

CONCLUSION

The Court should find that Big Horn has waived its Appointments Clause argument and that 20 C.F.R. § 725.308(c) is a valid regulation.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Director agrees with Petitioner that oral argument may assist the Court in deciding the issues in this case.

CERTIFICATE OF COMPLIANCE

1. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionately spaced, using Times New Roman 14-point typeface, and, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 6, 197 words as counted by Microsoft Office Word 2010.
2. Pursuant to the ECF User Manual, I certify that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.
3. Pursuant to the ECF User Manual, I certify that the hard copies to be submitted to the Court and parties to the case will be exact copies of the version submitted electronically today.
4. Pursuant to 10th R. 25.5, I certify that all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2018, the Director's brief was served electronically using the Court's CM/ECF system on

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